Supreme Court of the United States

OCTOBER TERM, 1940.

No. [redacted] 19

PHOENIX FINANCE CORPORATION, A CORPORATION OF THE STATE OF DELAWARE, PETITIONER,

VS.

IOWA-WISCONSIN BRIDGE COMPANY, A CORPORATION OF THE STATE OF DELAWARE, RESPONDENT.

RESPONDENT'S SUPPLEMENTAL BRIEF.

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RESPONDENT'S SUPPLEMENTAL BRIEF.

PREFACE.

In view of the fact that the Court has assigned this case for further argument respondent desires to submit the following supplemental brief.

On page 93 line 6 of respondent's brief there is a clerical error in the quotation from the master's report. The words "Phoenix Finance" should be changed to the words *"prima facie."*

Petitioner in its reply brief undertakes to avoid the force of the facts stated in respondent's brief by general assertions that they are not supported by the record. The statements in respondent's brief are fully substantiated by record references. The record is written and there should be no dispute about what it contains. The petitioner is unwilling to meet that record as it is and is undertaking to avoid it by a series of statements not supported by it and containing unjustifiable implications with respect to it. We feel that certain statements in petitioner's reply brief reflecting upon the Master, the trial court and the Circuit Court of Appeals, and upon the veracity of the statements contained in respondent's brief require a brief answer.

The petitioner assumes throughout its argument that Lord Redesdale's rule is applicable to this case. That it is wholly inapplicable is pointed out at the proper point in this argument *infra*.

Petitioner on page seven of its reply brief states: "With the striking of the major portion of the petitioner's answer and counterclaim there remains practically no material issue of fact." This statement is inaccurate. The issues tendered by the ancillary complaint are accurately set forth on pages 4 to 13 of respondent's brief. The designated "first defense" of petitioner's answer and counterclaim was not stricken. The remainder of the answer which was not responsive to the issues tendered by the ancillary complaint was stricken. The court in its ruling states: "The court being of the opinion that the remaining matter, including admissions and denials set forth in the first defense of said answer, designated as 'first defense' are sufficient for the proper consideration and determination of all issues *presented* by the supplemental and ancillary complaint" (R. 171-172).

The ancillary complaint and the first defense of Phoenix' answer presented the fact questions of whether all the items and matters involved in the Delaware actions and in the mortgage were previously adjudicated in this

foreclosure action. This involved the identity of the subjects presented in the Delaware actions and the mortgage described in the ancillary complaint with the matters considered and determined in this cause. On hearing the respondent bridge company asked the court to take judicial notice of the pleadings, evidence and records in this cause without exception, including the opinion and mandate of the Circuit Court of Appeals and offered them in evidence. Petitioner's counsel conceded that such judicial notice thereof should be taken. The respondent also offered in evidence certified, exemplified copies of the summonses, bill of complaint and declarations in the Delaware cases and a certified copy of the mortgage wrongfully recorded in Allamakee County, Iowa, and a certified, exemplified copy of the same mortgage recorded in Crawford County, Wisconsin (R. 260-272; 294-384).

The trial court who originally heard this case involving this voluminous record made findings of fact as to each of the Delaware actions and as to the mortgage, finding that the items and matters involved therein were involved in, considered, determined and adjudicated in this cause and made conclusions of law and entered final decree of injunction (R. 700-722). The Phoenix appealed therefrom to the Eighth Circuit Court of Appeals and that court reviewed and affirmed the trial court's findings of fact, conclusions of law and decree (R. 767-788). This presents the concurrent decision of the two courts, finding as facts that the matters involved in the Delaware actions and in the mortgage were involved in, determined and adjudicated in this cause.

In *Brainard* v. *Buck*, 184 U. S. 99, 22 S. Ct. 458, this Court said:

> "Upon the merits of the case, the two courts below have come to the same conclusion. The general finding of the trial court in favor of the complainants was a finding in their favor of all the material facts alleged in the amended bill, and those facts have been

repeated and affirmed in the court of appeals, and we are now asked to review and reverse those findings upon the testimony contained in the record. It ought not to be done in this case. It is the settled doctrine of this court that the concurrent decisions of two courts upon a question of fact will be followed, unless shown to be clearly erroneous."*[1]

The petitioner's assertions are directed almost wholly against the original record and not to the court's findings on hearing on ancillary complaint and petitioner's answer thereto, designated "first defense." As to the repeated statement that Phoenix did not participate in the trial and did not request and instigate the foreclosure action, the facts stated in respondent's brief as to the institution of the action are fully borne out by the references in respondent's brief pages 25 to 26 and substantially admitted in petitioner's original brief pages 5 and 6. As to its participation in the trial, see references in respondent's brief pages 37, 44-51, 56, 58, 60-66, 70.

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*[1]In *Dunn* v. *Lumbermen's Credit Ass'n*, 209 U. S. 20, 28 S. Ct. 335, this court said:

"We cannot, as we are asked to do by the appellants, reverse the findings of fact made by the Circuit Court and the Circuit Court of Appeals. Successively considering the same evidence, the two courts agree in the findings. In such a case in a suit in equity the findings will not be disturbed by this court, unless they are shown to be clearly erroneous. *Towson* v. *Moore*, 173 U. S. 17, 43 L. Ed. 597, 19 S. Ct. 332; *Brainard* v. *Buck*, 184 U. S. 99, 46 L. Ed. 449, 22 S. Ct. 458; *Shappirio* v. *Goldberg*, 192 U. S. 232, 48 L. Ed. 419, 24 S. Ct. 259. An examination of the voluminous testimony shows that it tended to sustain the findings, and that, to say the least, there is no ground for saying that the conclusions drawn from the evidence were clearly erroneous."

In *Alabama Power Co.* v. *Ickes et al.*, 302 U. S. 464, 59 S. Ct. 300, this court said:

"These findings were made, after hearing, by the district judge upon undisputed or conflicting evidence. The findings were not questioned by the court below; and since they are not without substantial support in the evidence, we accept them here as unassailable."

Petitioner on page 7 of its reply brief with reference to the Helmer N. Anderson bonds asserts: "Anderson was not a party to the foreclosure cause in any classification and did not participate in the cause directly or indirectly." This is a misstatement of the record. He was represented by the trustees and his bonds were in part allowed (Trustees' exceptions to master's report F. R. Supp. 7-9; F. R. 182-204; F. R. 1694).

As to the statement on pages 9-10 of the reply brief that the trustees did not act under section 10 of the trust indenture (F. R. 41) but under Section 3(c) (F. R. 37-38), petitioner is clearly attempting to avoid the effect of section 10 because it so thoroughly disposes of the contention that Phoenix was not represented by the trustees.

As to the intimation that there may be a question whether a power of attorney was granted under that section by the bondholders to the trustees, we need only look to the habendum clause of the trust indenture (F. R. 21 and 22) and the bonds (F. R. 14-16), to find that the bonds were issued under and in pursuance of the trust indenture, and that the indenture provided that the bonds should be issued, delivered, received and negotiated subject to its conditions.

Sections 3(c) and 10 are not alternative. Section 3(c) merely gives bondholders the right to compel the trustees "to protect and enforce their rights and the *rights of the bondholders* under this indenture by a suit or suits in equity or at law, whether for the specific performance of any covenant or agreement contained herein, or in aid of the execution of any power herein granted, or for any foreclosure hereunder, or for the *enforcement of any other appropriate legal or equitable remedy*," etc. (Emphasis supplied).

Section 10 contains the covenants of the company as to the action which may be taken by the trustees on default, and makes clear the rights of the trustees to re-

cover a money judgment either in connection with or without foreclosure.

The sections are complimentary and by the prayer of the bill (F. R. 10-11) it is clear that the trustees, acting at the request of Phoenix under section 3(c), proceeded to "protect and enforce * * * the rights of the bondholders," and were entitled, if they prevailed, among other things, to a deficiency judgment in addition to foreclosure. As a matter of fact, section 3(c) confers upon the trustees all the rights of representation of the bondholders here claimed to have existed, and section 10 simply makes the extent of those rights more specific insofar as the recovery of a money judgment either originally or by way of deficiency is concerned.

Petitioner devotes a great deal of space at pages 11, 27-43, in its reply brief disputing the master's and the court's original findings as to the control of the Iowa-Wisconsin Bridge Company, by John A. Thompson, and his associates, officers and directors of the Phoenix Finance Corporation and of its predecessors Phoenix Finance System, Inc. The petition of intervention charged such control (F. R. pp. 74, 78 to 82) and that matter was directly an issue on the original trial. The petitioner on page 31 of its reply brief quotes from the master's report and then asserts in italics "there is not a single record reference thus given by the master which supports those findings." The report of the master (F. R. 128) shows that the references given by the master refer to the pages of the original depositions, transcripts, books and exhibits in evidence and not to the pages of the printed record since that had not been printed at that time; the testimony being later reduced to narrative form and thereafter the record printed and petitioner's assertion is without record citation or foundation. Trustees and petitioner in their exceptions to the master's report assailed the master's findings of fact and conclusions of law as to control (Trustees' exception No. 2-c, F. R. Supp.

7, Phoenix' exceptions Nos. 1 and 2, F. R. Supp. 17-20). The trial court reviewed the master's report and evidently found that the master's citations to the original record supported his findings and the court overruled the exceptions (F. R. Court's opinion 161-162 and 166-179; court's findings of fact 179, 180, 181, 182, 183, 184, 188 to 202, decree pages 202-204).

The petitioner's assertions with respect to control are the same as made in its petition for re-hearing in slightly modified language. The same claim of percentages to stock ownership appear in its petition for rehearing and the citations made by petitioner for its present assertions nearly all refer to its petition for rehearing (F. R. 219, 254, 264, 267, 282, 284, 290, 292, 311, 312, 339, 340, 355 to 357, 375, particularly page 311). The assertions contained in the petition for rehearing were controverted by defendants' and interveners' answer thereto (F. R. 394-399). The petition for rehearing was overruled and this ruling affirmed by the Circuit Court of Appeals (F. R. 411-413 and 1707).

To hold and exercise control of a corporation, it is not necessary that the person exercising such control own and control a majority of the stock. It has been held that where there are a large number of stockholders, as in the instant case, that such control may exist though the party exercising it and those associated with him hold a percentage of the stock much less than a majority and exercise such control through their own holdings and by proxies which they are able to procure through their control of the management of the corporation.

U. S. v. *Union Pacific R. Co.*, 226 U. S. 61.
Delaware Hudson Co. v. *Albany and Susquehanna et al.*, 213 U. S. 435.

The question of control has been fully adjudicated. In addition to the facts stated and references given in respondent's brief pages 68 and 69 we have attached hereto as an appendix a statement of the facts relating to such

control with record citations fully supporting the findings of the court for use if this court is interested therein.

On page 12 of the reply brief counsel for petitioner asserts that no record references are given to support the statements on page 35 of respondent's original brief as to the $20,100 of bonds delivered as collateral to certain claimed indebtedness. In view of the fact that all the findings had been reviewed by the Circuit Court of Appeals upon the first appeal and full record references in support of them given in the brief on that appeal, it seemed unnecessary to burden this Court with such references. Counsel, however, overlooks the discussion of these bonds and appropriate references appearing at pages 46-48, 91-99, 100, 101-103 of respondent's original brief.

Only because of the statement of counsel in the reply brief do we give the following further record citations: Fraudulent bond interest items, F. R. 1571; 1563-5-7, 534; 1567, 1569; Offsets, Court's finding 24, F. R. 181-191; findings 27, F. R. 192, 28, F. R. 193, 29, F. R. 19, 30, F. R. 194. Evidence: Wilder $3,000 F. R. 582, 601, 627-629, 633, 819, 821, 1401, 1403, 1531; $14,000 "guaranty contract," Exhibit 3, F. R. 1393, 1395, 598, 640-641, 880-883, Exhibit Johns B, F. R. 1682, 1684, 1020, 117, 876, 880; commission on Thompson stock, F. R. 601, 602, 1529; Thompson notes, F. R. 604-605, 1131, 1535.

Petitioner on page 13 of its reply brief asserts "There is no evidence of any character to indicate any connection with any conspiracy or wrong-doing by Phoenix Finance Corporation." This is a misstatement of the record and contrary to the court's finding (No. 41 F. R. 202) "That the Phoenix Finance Corporation at the time of its organization was officered and controlled by the same officers as Phoenix Finance System, Inc., and took over the succession of both assets and liabilities with full notice of the facts and circumstances surrounding the bond issue in controversy in this case, and assumed the entire

fruits and activities of its predecessor, as far as concerns this case, and proceeded to carry on with the same notice and purpose, adopting the plans and results of its predecessor." The court's finding is fully supported by the record (See respondent's brief 34-36 and citations there given and see F. R. 549-550, 635-637, 673-675; 540-542, 545, 546).

Petitioner on page 15 of its brief contends that it should not be referred to as a complainant. When it was made an ancillary party it was made a co-complainant and therefore reference to trustees and petitioner as complainants as made in respondent's brief are appropriate and accurate. It is designated as a complainant in the narrative statement. John A. Thompson president of Phoenix was called as a witness and testified on the side of complainants in the main case (F. R. 531, 538).

Petitioner on page 16 of its reply brief states "respondent states (without record references): 'That said John A. Thompson, as shown by the evidence, moved said records to Florida.' This is a most unfair insinuation and is contrary to the fact." The citation for respondent's statement precedes the statement on page 53 of its brief (Verified answer to petition for rehearing, F. R. 394-398). Petitioner's statement is without record citation and without foundation.

Emory H. English, vice-president of the Phoenix Finance Corporation, testified the books were in Florida; were not in Des-Moines during 1934 to his knowledge unless Mr. Thompson may have had some of the books with him on some trip and carried it back; that he never saw it. The order for production was made April 24, 1934, and directed production within ten days. English testified he couldn't produce the books. They were under Thompson's (Phoenix' president) control (F. R. 613-615 and 97-98).

The court's finding in its ruling on petition for rehearing that the books were not produced is fully sustained by the record, as shown in respondent's brief note

8, pages 60-62, and record citations there given, and note 14, page 79.

Petitioner asserts on page 18 of its reply brief that it did not have notice of nor opportunity to answer the charge in respondent's and interveners' answer to petition for rehearing and modification of decree that the books were not produced and that it orally resisted the charge is not supported by the record nor is any record citation given for it. Respondent and interveners' answer to petition for rehearing supported by affidavit was filed of record February 18, 1937 (F. R. 394-410, filing date 410).

Petitioner Phoenix could have filed a denial of any matter contained in respondent's answer at that time if it had thought there was any basis for it or could have dictated such denial into the record, or asked the court for additional time to file it. The record shows that Phoenix did neither. The hearing was had on the 17th day of February, 1937, and the matter submitted and taken under advisement and on the 4th day of March, 1937, the court rendered its opinion and ruling (F. R. 411-413).

Petitioner's president John A. Thompson was present at the trial and a witness for complainants. He knew that the books of the Phoenix Finance Corporation and its predecessor Phoenix Finance System, Inc., were called for in the taking of the depositions and at the trial and that he could have produced them in evidence. English had testified that the books of Phoenix Finance Corporation were not available and Phoenix officers obviously knew at the time of the hearing on the petition for rehearing that it could not deny the nonproduction without running the risk of subjecting one of its officers to the charge of perjury.

In face of this record and the record cited in respondent's brief note 8, pages 60-62, and note 14, page 79, the petitioner has the temerity to make the unfounded statement that respondent's statement "the fact is neither the

books nor entries therefrom were produced" is false. But petitioner has wholly failed to give any record citation to the original record supporting its unwarranted assertion. The claim that the books and entries therefrom were produced was made for the first time in this ancillary proceeding in paragraph 43 of petitioner's unverified answer and counterclaim filed November 27, 1939, which was stricken as in contravention of the record (R. 166, filing date R. 167).

On page 19 of petitioner's brief it refers to paragraph 40 of its answer and counterclaim which was stricken and then avails itself, in violation of the rules of this court, to go outside of the record on the pretended ground that respondent's counsel asked the court without exception to take judicial notice of all the records, papers and files in this cause. This request was made and the records judicially noticed, as well as offered in evidence, but petitioner's counsel must be presumed to know the requirement of rule 75 of the rules of civil procedure requiring parties to file their respective designations as to what is to be included in the printed record, and that the appellant first files its designation and that then the appellee can designate such additional portions of the record as appellee deems material in view of appellants' designations. Petitioner had full opportunity to designate any part of the record that it deemed material and it did not designate any part thereof for its present outside of the record assertions, obviously knowing that respondent could also make designations and that the record would not bear the construction petitioner seeks to place upon it.

At page 23 of its reply brief petitioner asserts that the finding that the $50,000 mortgage was fraudulent and without consideration was based on "successful legerdemain by counsel for respondent * * * without supporting evidence."

Must it again be stated that the matter of this mortgage was considered by the master, by the trial court, both prior to the original findings and upon petition for rehear-

ing and by the Circuit Court of Appeals and that each found it to be wholly without consideration, fraudulent and void?

To say that in each case counsel for respondent secured a favorable decision without evidence and by sleight of hand is certainly impertinent and verges on contempt. If this assertion deserves notice by this Court, we cite the following record references: Master's finding adopted by the court, F. R. 131; court's opinion, F. R. 171-173; Court's finding 26, F. R. 191-192; Evidence, F. R. 568-586, 585-586, 607-610, 611, 612, 616-617, 642, 677, 678-684, Exhibit B-17 (H. E. B.), F. R. 813, Exhibit B-18 (H. E. B.), F. R. 815, F. R. 902-904; 823-825; 551-554; 627-633; 1531, 1539; 1517; 682-683).

In connection with this testimony there must be kept in mind the testimony which showed that the bridge company had paid $320,000 in stock and $10,000 in cash for the completion of the bridge (F. R. 569, 798-799, 877, 883, 903-904); that the stock had been sold to Thompson & Company and Shaffer & Company held Thompson & Company's note for it, on which there was a balance unpaid of over $92,000 at the time the mortgage was executed (F. R. 662).

Petitioner on page 26 of its reply brief asserts: "At page 105 the respondent's statement that Phoenix in any manner 'took issue' with interveners' charges with respect to the 517 shares of "A" stock is wholly untrue and no record reference being cited therefor, should be ignored." Petitioner in that statement overlooks or ignores that the paragraphs of respondent's brief immediately following the statement pages 105 to 110 state in detail the manner in which petitioner took issue with those charges, giving full record citations (See respondent's brief pages 105 to 110 both inclusive, and citations there given).

The statements on page 26 of petitioner's reply brief are fully answered in respondent's original brief pages 31-36 and 113-116) (Also see F. R. 640-641; 1684; 598; 1527; 545; 681; Ex. Shaffer I F. R. 817; 570-574; 576-577; 817-818; 592-593).

SUMMARY OF ARGUMENT..

Petitioner has failed to show that the findings of the trial court on hearing for permanent injunction, affirmed by the Circuit Court of Appeals, are not fully sustained by the record. Petitioner was represented by the trustees and was an ancillary party in the original proceeding and all the matters involved in the Delaware actions and the mortgage were adjudicated in this case.

Lord Redesdale's rule has no application to the present case. Injunction was properly issued as a writ of assistance under Judicial Code, Section 262. The respondent by the supplemental bill was not seeking to piece-out an incomplete decree and then to enforce it. It sought the benefit of the fruits of the decree affirmed by the Circuit Court of Appeals. The cases cited by petitioner are all cases of consent, *pro confesso,* unexecuted or incomplete decrees. In the case at bar no modification of the decree was sought and the case is not one in which a new trial of the former action can be had.

There was no pleading or proffered evidence of fraud which would justify a re-opening of the decree. Petitioner was not in any manner prevented by respondent from fully presenting its case in the first instance.

The injunction granted is within the well recognized powers of a court of equity and under the facts was proper and necessary to afford adequate relief to respondent and was properly granted to avoid a multiplicity of vexatious and harassing suits and to remove the cloud on respondent's title.

The granting of the injunction did not violate Section 265 of the Judicial Code, but was in harmony with the decisions of the Iowa Supreme Court and of this Court and in accordance with the construction placed on that section by this Court.

Congress has concurred in the construction placed on Section 265 by this Court. While it has had knowledge of such construction and has amended other sections of the Judicial Code, it has not amended this Section.

ARGUMENT.

Petitioner in its original brief and in its reply brief directs its argument against the original findings of fact of the master and of the trial court as though it were arguing this case before the Circuit Court of Appeals on petitioner's first appeal there, wholly unmindful of the fact that it at that time argued all questions with respect to said findings and that that court affirmed the trial court's decision, and that petitioner filed a petition for rehearing before the Circuit Court of Appeals which was denied; and that it then filed a petition for writ of certiorari with this Court which was denied. Petitioner makes the bald assertions in its briefs that the findings and rulings of the trial court on the original hearing are not supported by the record, and then in support thereof merely makes references to its original petition for rehearing before the trial court, and to the portions of its answer and counterclaim re-stating the contents of the original petition for rehearing in slightly modified language, but which were stricken as contravening the record.

The trial court on the hearing on the ancillary bill and petitioner's answer thereto designated "first defense" made findings of fact on the evidence judicially noted and offered at such hearing that all of the matters and items involved in the Delaware actions and in the mortgage were involved in, fully litigated and determined in the original trial of this cause; and that unless petitioner was restrained by the court the respondent (defendant) would be deprived of the fruits and advantages of the judgment decree and orders of the court in this cause and that petitioner (complainant) would continue with vexatious suits in utter disregard thereof, and that the acts of petitioner would cast a cloud over defendant's

title and franchises because of a multiplicity of vexatious suits brought and to be brought against the respondent (defendant) and that it would be damaged in a way that could not be repaired or estimated at common law and that from these threatened wrongs the defendants had no adequate remedy at law, and that the only remedy was in equity (R. 700-722). The petitioner has wholly failed to show that any of such findings of the trial court are not supported by the record nor that the fact statements contained in the opinion of the Circuit Court of Appeals affirming the decree of permanent injunction are not fully supported by the record (See respondent's brief 88-127; petitioner's brief 24-41; petitioner's reply brief 23-26).

The petitioner has cited the decision of the Delaware Court as a matter of argument and we have replied to it as such. The question before the Court is the correctness of the decree of the trial court on permanent injunction, which is controlled by the decisions of the Iowa Supreme Court and of this Court, and the respondent has cited such decisions in its original brief pages 128-200.

The argument of petitioner in the original brief, repeated in its reply brief (pages 44-49), that the adjudications of Phoenix' claims against the bridge company and the bridge company's claims against Phoenix were not within the issues of the original bill and that there was no prayer as to Phoenix entirely disregards the actual pleadings. There was a prayer by complainants that brought into issue all the questions of consideration. Not only did the trustees ask for an adjudication of the amount due on the bonds and for a deficiency judgment in case the proceeds of a sale be not sufficient to satisfy the decree to be rendered (F. R. 10), as they had the right to ask, but they alleged that all of the bonds secured by the deed of trust had been issued for a good and valuable consideration and were outstanding in the hands of divers

persons and corporations who were the owners and holders thereof for value (F. R. 6). And Phoenix in its answer to the petition of intervention alleged that it was the owner and holder for value of a large amount of bonds issued in accordance with the mortgage declared on in the bill of foreclosure, asked that its rights as a holder of bonds be fully protected, and prayed for general relief (F. R. 91-92).

These allegations were all put in issue by the answer of the defendant and by the petition of intervention as has been pointed out in respondent's original brief at pages 25-33.

Before the trustees could have been entitled to a decree, the issues as to consideration must necessarily, under the pleadings, have been litigated and determined favorably to them and to the bondholders they represented and particularly Phoenix, which concededly owned 90% of the bonds and was an ancillary party. Had those and the other issues been determined favorably to the trustees and to Phoenix not only would a decree of foreclosure have been entered, but if after sale there had been a deficiency the trustees would have been entitled to collect the deficiency on execution for the benefit of Phoenix and the minor bondholders. Certainly petitioner will not claim that if the determination had been favorable to the trustees and to Phoenix and a sale of the property had been had with a resultant large deficiency respondent could have come in and resisted collection of the deficiency on the ground that the action was purely an action *in rem*, such as *Federal Land Bank of Omaha* v. *Jefferson et al.*, 295 N. W. 855, cited in petitioner's reply brief (page 45), where the prayer was that "the judgment be *in rem* only" and that therefore it was not proper for the court to enter a judgment for the deficiency. While in the instant case the prayer of complainants was for a deficiency judgment and for general equitable relief and the Phoenix' answer to the petition of intervention also

contained a prayer that its rights as a holder of bonds be fully protected and for general equitable relief. Certainly it cannot be said that a determination in favor of one party is without the issues if it is obvious that a contrary determination would have been within the issues.

Petioner's assertion on page 47 of its reply brief that interveners' pleadings related only to Phoenix Finance System, Inc., and not to it, is inaccurate. All the pleadings filed in this action applied to it; it was the holder of 90% of the bonds when the action was instituted and the pleadings applied to it as fully and completely as though the petition of intervention had been amended, inserting its name therein in lieu of that of Phoenix Finance System, Inc. (See respondent's brief pages 33 and 34 note 5 page 34, and authorities cited pages 131-144).

All the claimed underlying considerations of Phoenix for bonds held by it (now involved in the Delaware actions and in the mortgage) were put forward by the petitioner as claimed considerations for such bonds, placed in issue and investigated and litigated to the minutest detail and to the fullest extent and determined and cannot now be re-litigated (See references in respondent's original brief pages 37-40, and 88-125; see also Phoenix' exceptions to report of special master F. R. Supp. 23-58).

Petitioner's assertion on page 49 of its reply brief that the matter in regard to the 517 shares of preferred stock litigated in this cause concerned the internal affairs of the Delaware corporation and was not within the jurisdiction of the Federal Court is erroneous and petitioner's statement referring to its brief pages 80-83 "the respondent has made no attempt to answer this section of petitioner's brief" is inaccurate. Petitioner overlooks or ignores pages 169-179 of respondent's brief which answers petitioner's contentions.

Petitioner on page 49 of its reply brief asserts "Under the doctrine of the Thomas case, petitioner contends, however, that it is entitled to recover in courts of competent

jurisdiction its entire advances to the bridge company of $98,346 plus interest." This repetition of pages 43-44 of petitioner's brief is answered at page 52 of respondent's brief. The Thomas case cited in respondent's brief at pages 142 and 155 does not support petitioner's contentions.

Petitioner on page 50 of its reply brief refers to its contentions in point 6 of its brief pages 90-95. Those contentions have been fully answered in respondent's brief pages 197-200. Also see *Stewart* v. *Dunham*, 115 U. S. 61, where it is held:

> "After a United States Court has assumed jurisdiction by reason of the litigants being residents of different states, the admission of new parties, as co-complainants, who are residents of the same state as the defendants, does not oust the United States Court of jurisdiction."

And see *Supreme Tribe of Ben Hur* v. *Cauble et al.*, 255 U. S. 356. The latter case involved a class suit which was commenced by citizens of Kentucky and other states outside of Indiana in the Federal Court of Indiana against a fraternal society, a resident of the latter state. Thereafter certain residents of Indiana, members of the class, commenced actions in the state courts in which they sought to re-litigate questions which had been determined in favor of the defendant in the suit in the Federal Court. An ancillary bill was filed in the Federal Court seeking to enjoin the maintenance and prosecution of the actions in the state courts. The lower court dismissed the bill on the ground that members of the society residing in Indiana could not be bound by representation in a class suit if their presence would have ousted the jurisdiction of the Federal Court in the main case, and therefore that the decree was not *res judicata* as to them, which is identical with the claim of Phoenix here. This court held, following *Stewart* v. *Dunham*, *supra*, that since Indiana citizens were of the class represented and diversity of

citizenship having given the court jurisdiction in the first instance the intervention of such Indiana citizens would not have defeated the jurisdiction already acquired and that the members of the class to which the Indiana citizens belonged were concluded by the decree of the district court and an ancillary bill might be prosecuted in the same court to protect that decree by injunction.

Petitioner in its reply brief at pages 50-51 pretends to state what is stated in respondent's brief: "In respondent's brief (pages 197-200) the petitioner's authorities are attempted to be distinguished because, says respondent (page 199):

> (a) It appeared in those cases that there was a substantial and indispensable interest held by a party not a party to the record, or
>
> (b) The cases appeared to be those in which the introduction of an indispensable party, holding an interest in the lawsuit, ousted jurisdiction.
>
> *Both (a) and (b) are exactly the case sub judice.*"

But that is not what respondent stated in its brief. It stated the following (199), the italicized portions of which are conveniently omitted by petitioner, to-wit:

> "The cases cited by petitioner are all cases in which
>
> (a) It appeared from the complaint or answer filed that there was a substantial and indispensable interest *in the lawsuit owned and* held by a party not a party to the record *and that adjudication could not be made of the controversy presented without the presence of such party unrepresented in the pending litigation;* or
>
> (b) Cases in which the introduction of an indispensable party holding an interest in the lawsuit, *wholly unrepresented,* ousted the jurisdiction of the court."

Petitioner evidently recognizes the force of the fact that it was represented by the trustees and was also made an ancillary party.

LORD REDESDALE'S RULE HAS NO APPLICATION TO THE PRESENT CASE.

This matter is we believe sufficiently covered by the original brief pages 200-204, but in view of the insistence of petitioner and his repeated assertions with respect to it we submit in addition the following:

The petitioner on page 7 of its reply brief states: "The obvious purpose of the stricken portions of petitioner's answer and counterclaim was to challenge the foreclosure decree as 'wrong' under Lord Redesdale's rule." With reference to the stricken portions of the answer the trial court in its order striking the same stated that the petitioner "is clearly endeavoring to re-litigate questions of law and fact which were litigated and opportunity given to litigate on the trial of the principal case, in which trial and decison all accounts, indebtedness and matters entered into the consideration of the issue of each and all of the bonds secured by the mortgage sought to be foreclosed were in question, and were considered and determined" (R. 171-172). Petitioner assumes throughout its reply argument that it is entitled to relitigate what has been previously determined. If petitioner's position were correct, then all a litigant would need to do with respect to final adverse decisions rendered by the court would be not to perform them and to pay no attention to them and then if an ancillary proceeding be brought to compel obedience merely claim the right to try the whole case over again, and if that might be done once of course it might be carried on *ad infinitum*, and the decisions of the trial court rendered ineffectual and appellate procedure rendered wholly superfluous.

Judicial Code, Section 262, U. S. C. A., Section 377, provides:

> "Power to Issue Writs. The Supreme Court and the District Court shall have power to issue writs of

scire facias. The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

The trial court exercising its power under this section entered the permanent decree of injunction to enforce its decree and to preserve the fruits thereof to the respondent.

In *Root* v. *Woolworth*, 150 U. S. 401, this court said:

> "It is well settled that a court of equity has jurisdiction to carry into effect its own orders, decrees and judgments which remain unreversed, when the subject matter and parties are the same in both proceedings. * * *
>
> "The jurisdiction of courts of equity to interfere and effectuate their own decrees by injunction or writs of assistance in order to avoid the re-litigation of questions once settled between the same parties is well settled. * * *
>
> "The power of the court to issue the judicial writ or to make the order and enforce the same by a writ of assistance, rests upon the obvious principle that the power of the court to afford a remedy must be co-extensive with its jurisdiction over the subject matter. Where the court possesses jurisdiction to make a decree it possesses the power to enforce its execution."

An ancillary bill is but the continuation in a court of equity of the original suit, to the end that justice may be accomplished thereby.

> *Campbell* v. *Golden Cycle Mining Co.*, (8 C. C. A.) 73 C. C. A. 260, 141 Fed. 610, 612.

The ancillary proceedings in the instant case is not a new case, but a continuation of the original case to enforce the decree of the court and preserve the fruits of that decree.

The above quoted statute provides for writs of assistance and it cannot well be said that whenever such a writ of assistance is asked the whole case is to be tried over again at the suggestion of the party against whom the decree is rendered. If such were the case the suggestion might as well be made the morning after the rendition of the decree as later. Respondent is seeking to enforce the decree rendered. As stated in the opinion of the Circuit Court of Appeals: "The bridge company is not seeking to piece out an incomplete decree and then to enforce it. All that is sought here is the benefit of the fruits of a decree affirmed by this court. That decree is conclusively presumed to be correct. If it were otherwise there could be no end to litigation, the rule of the finality of judgments would have no efficacy, and the doctrine of *res judicata* would be annulled" (R. 784). The ancillary bill discloses that the statement of the Circuit Court of Appeals is fully sustained by the record (R. 3 to 100).

O'Brien v. *Wheelock*, 184 U. S. 450, cited by petitioner, bears no similarity to the instant case. Relief was denied on the ground of laches. The supplemental bill brought in parties who were not parties to the original bill. The court said "It was an original bill as to these new parties and they were entitled to all of the defenses which existed when it was filed."

Lewers & Cooke v. *Atcherly*, 222 U. S. 285, cited by petitioner, involved an unexecuted decree, and the case had not passed to final decree.

As to the case of *Gay* v. *Parpart*, 106 U. S. 679, cited by petitioner, this court said in *Harding* v. *Harding*, 198 U. S. 317, 335, that it "dealt merely with the right of a court of equity to refuse to lend its aid to enforce an incomplete and ineffective decree in partition proceedings because to do so would be inequitable."

Petitioner refers to *Wadhams* v. *Gay*, 73 Ill. 415, in its brief, but the Illinois Court in the later case of *Hultberg* v. *Anderson*, 252 Ill. 607, 97 N. E. 216, 220, writ of error dismissed 238 U. S. 605, said:

> "But this rule has no application to decrees that are complete and perfect and free from any inherent defect which prevents their execution."

In *American Radium Co.* v. *Hipp*, 279 Fed. 601, cited by petitioner, a consent decree in a prior case had been entered. The court said:

> "But now a different plaintiff appeals to a court of equity to piece out the decree and give to it a valuable right; *i. e.*, an accounting, which was not accorded to Junghams nor reserved by him for his assigns."

The rule for which petitioner contends has no application. No modification of the decree was sought. *Utah Power & Light Co.* v. *U. S.*, (Court of Claims) 42 F. 2d 304, at 308.

Petitioner's contention that the respondent sought to "piece out" and enlarge an incomplete decree and then to enforce it is not supported by the record. When the court made its decree dismissing the bill of plaintiffs as to the Phoenix Finance Corporation and denying the prayer of the bill, it adjudicated every question involved in the litigation adversely to petitioner and its representatives, the trustees. *Hickey* v. *Johnson*, (8 C. C. A.) 9 F. 2d 498, 501. This included, as has been pointed out, all of the matters and items involved in the Delaware cases and in the mortgage which was held fraudulent and without consideration and void.

The findings of fact, having gone into the decree, are conclusive as to the facts found. Every defense requiring the negation of any of such facts is met and overthrown by the adjudication. The opinion is part of the record and may be looked to as to what was in issue and

determined by the decree. *Last Chance Mining Co.* v. *Tyler Mining Co.*, 157 U. S. 683, 690-691; *Mason Lumber Co.* v. *Bechtel*, 101 U. S. 638, 11 Otto 638.

The record shows that the opinion and findings of fact (F. R. 156-202) were filed with the decree. The decree says (F. R. 202):

> "The above entitled cause came before the Court on the first day of December, 1936, it being the first day of the December, 1936, term of this Court, for the filing of Opinion ruling upon exceptions to the Master's Report, taking final submission of the cause upon the Master's Report and his advisory findings and the evidence in the cause, and the entry of a final decree."

Petitioner, in its petition for rehearing and modification of decree, asked in the alternative that there be withheld from the adjudication the mortgage, reserving to the petitioner the right to litigate such mortgage in another case if it desired, that it be reinvested with the stock, and that the decree be modified to withhold from adjudication the right of petitioner to institute actions at law against the bridge company if it so desired for money had and received (F. R. 223). This was overruled (F. R. 411 to 413). This constituted a further adjudication. *Spencer* v. *Watkins*, (8 C. C. A.) 169 Fed. 378, Cert. Den. 215 U. S. 605; *American Surety Company* v. *Baldwin*, 287 U. S. 156. The Circuit Court of Appeals had also rendered its decision determining the matters herein involved.

In *Root* v. *Woolworth*, 150 U. S. 401, this court said:

> "When the court adjudges a title to either real or personal property to be in one as against another, it enforces its judgment by giving the enjoyment of the right to the party in whose favor it has been decided." That is what the Court did in the instant case.

FURTHER ANSWER TO PETITIONER'S POINT NINE.

There was nothing in the stricken portions of petitioner's answer and counter claim nor in offer of proof justifying a reopening or a re-examination of the case.

The decree was not by consent or *pro confesso* but one entered after every issue had been fully litigated and the decree was in no way incomplete or defective. An analysis of the answer and counter claim and of the offer of proof made by petitioner makes it very clear that they furnished no justification for a reopening or a reexamination of the case.

After the order of the court striking certain matter from the answer and counter claim (R. 171) there was left the first defense except a small part, and by the admissions and denials of that defense, all the *issues tendered* by the supplemental and ancillary bill and the amendment thereto were either admitted or put in issue (R. 147-151) (See original brief 18-25).

The alleged defenses 2 to 7, being paragraphs 13-45 of petitioner's answer and counter claim (R. 151-167), were properly stricken. Petitioner at page 7 of its reply brief admits that those portions of the answer were for the obvious purpose of challenging the foreclosure decree as "wrong."

The offers of proof made by petitioner on the trial of the injunction proceeding merely amount to elaborations of the matters set out in those portions of the answer which were stricken and, which have been commented upon and amount to nothing more than an attempted relitigation of the issues determined in the main case (see original brief 77-88 and notes on said pages).

The claims of petitioner of alleged fraud and of its asserted right to relitigate the question of considerations

are concisely stated in the opinion of the Circuit Court of Appeals, R. 784-787.

Petitioner, in its original brief (pages 104-105), summarizes these claims as follows: "(1) because of understanding, following approved Federal practice, with respect to the two-stage theory, by reason whereof Phoenix was prevented from offering its evidence, (2) because it was denied relief on petition for modification of the Foreclosure decree because of false representations of opposing counsel accepted by the Court with respect to its alleged failure to produce books as ordered, and (3) because of the circumstances of extrinsic fraud stated in stricken paragraph 44 of its Answer and Counterclaim."

As to petitioner's claim of some understanding with reference to so-called "two-stage theory," there was no such understanding or misunderstanding (*Spears Sand and Gravel Works* v. *American Trust Co* (4 C. C. A.) 20 F. 2d 333, 336). The cause, by agreement of parties, was referred to the Master in its entirety (F. R. 107-108). At the conclusion of the evidence, the Master fixed time for filing of briefs and stated: "I would like to have the theory of all parties definitely in reference to the consideration" (F. R. 693). The entire matter was submitted to the Master for decision at one time (F. R. 694-695).

Petitioner filed exceptions to the Master's report which were adopted by the trustees (F. R. Supp. 14-58 and Page 7). Petitioner then filed petition for rehearing adopted by trustees, in which the same so-called "two-stage" theory and alleged understanding was asserted (F. R. 216-233 and 214). An answer thereto was filed by respondent bridge company and interveners denying that there was any misunderstanding (F. R. 394 to 398). The petition for rehearing and modification of decree were overruled (F. R. 411-415). This ruling was affirmed (F. R. 1707). It had been previously adjudicated that there was no misunderstanding. See respondent's brief pages 40-42, 49-59, 179, 180. This claim of petitioner furnished

no basis for setting aside the decree and re-opening the case.

Pittsburgh Reduction Co. v. *Cowles Elec. S. & A. Co.*, (C. C. N. D. Ohio) 64 Fed. 125, 127.

As to the claims of false misrepresentations of opposing counsel with respect to the failure of petitioner to produce books as ordered on hearing of petition for rehearing and modification of decree, the facts with reference to the non-production of such books have been fully discussed and record citations given in petitioner's original brief pages 59-60 and Note 8 pages 60-62 and *supra* of this supplemental brief, pages 9 to 11. Petitioner had full opportunity to present anything it wanted to with respect to this pretended claim on the original hearing. This claim, made for the first time in this ancillary proceeding in contravention of the record, furnished no basis for setting aside the decree and re-opening the case.

As to the allegations of Paragraph 44 of petitioner's Answer (R. 166-167), these are fully discussed in the note relating to that paragraph appearing at pages 20-21 in respondent's brief, and the facts attempted to be pleaded do not constitute fraud, and are wholly insufficient to furnish any basis for setting aside the decree and opening the case.

Southern Pacific R. R. Co. et al. v. *U. S.*, 168 U. S. 1.

Abel v. *Partello*, 202 Iowa 1236, 211 N. W. 868.

Graves v. *Graves*, 132 Iowa 199, at 204.

There is nothing in the opinion in the case of *U. S.* v. *Throckmorton*, 8 Otto 61-71, 98 U. S. 61, which justifies petitioner's statement that it is only where a party is seeking to have affirmatively a judgment or decree set aside on the grounds of fraud, that the alleged fraud must be extrinsic to the issues, and that that rule does not apply where a party is defending against the enforcement of a judgment or decree.

The case of *Chicago, R. I. & P. Ry. Co.* v. *Calcotte,* (C. C. A. 8) 267 Fed. 799, cited by petitioner is no authority for the contention of petitioner, but on the contrary re-affirms the holding of the Throckmorton case that fraud to be available must be extrinsic to the issues which were determined, and that even erroneous and perjured testimony which relates simply to the issue directly contested does not constitute extrinsic fraud.

The rule stated in the Throckmorton case is also the rule in Iowa.

In *Abell* v. *Partello,* 202 Iowa 1236, 211 N. W. 868, the court said:

> "The rule is settled under our previous cases that the fraud of which a court will take cognizance in an equitable proceeding to vacate judgment or decree after the expiration of one year must be such as was collateral to the proceeding and issues in the original case. The fraud charged cannot be predicated upon a conflict of evidence in the trial, nor even upon perjury committed therein. The relative weight of evidence and all charges and countercharges of perjury are deemed as necessarily adjudicated in the original proceeding" (Citing cases including the Throckmorton case).

Also see:

> *Toledo Scales Co.* v. *Computing Scales Co.*, 261 U. S. 399, 43 Sup. Ct. Rep. 458.

The propriety of the rule in the Throckmorton case is apparent. If it were not for that rule, any unscrupulous litigant, after being unsuccessful in the litigation, could make false statements as to what occurred before the court and present those as a basis for setting aside the court's decree, although the court would know that the matters thus stated did not occur in the trial. It would open the door for fabrication and falsehood.

Petitioner, on page 104 of its brief, quotes from the Throckmorton case the words: "Where the unsuccess-

ful party has been prevented from exhibiting fully his case by fraud or deception on him by his opponent," and then claims that it falls within that language. Petitioner ridiculously assumes in its assertions that the Master, Hon. J. W. Kindig, a former Justice of the Supreme Court of Iowa (Iowa Supreme Court reports, of which this Court takes judicial notice), and Hon. Geo. C. Scott, Judge of the Federal Court for the Northern District of Iowa, could be induced to make findings of fact and decree and rulings by mere misrepresentations of the evidence in the case although the record shows that they spent months in reviewing the case and the Master's report and the court's opinion, findings and rulings show on their face the care and thought that they devoted to the determination of the case, and are a complete refutation of the unwarranted statements of the respondent. Petitioner also seems wholly oblivious to the fact that this record was fully reviewed by the Circuit Court of Appeals.

It must be noted that petitioner's claims as to misrepresentation first made their appearance over two years later in this ancillary proceeding when petitioner was called upon to obey the decrees of the court. Petitioner and trustees were represented by able counsel, both in the trial court and in the Circuit Court of Appeals, and the petitioner availed itself of every opportunity to fully present its side of the case as shown by the record. The record shows that intervener's counsel stated very pointedly, and in terms that could not be misunderstood, that the whole case was being tried and submitted (R. 694-695). There was nothing to prevent the petitioner from bringing its books and the books of its predecessor and placing them in evidence, excepting its own unwillingness to do so. It could subpoena and call any witnesses that it wanted to and it exercised its own judgment with respect thereto. It had a full, fair trial and its assertion that the respondent or interveners prevented it from exhibiting fully its case is without foundation.

Embry, Adm'r, etc., v. *Palmer et al.*, 107 U. S. 3, 2 Sup. Ct. Rep. 25.

Toledo Scales Co. v. *Computing Scales Co.*, 261 U. S. 399, 43 Sup. Ct. Rep. 458.

FURTHER ANSWER TO PETITIONER'S POINT THREE.

The injunction granted here was within the well recognized powers of a court of equity and under the facts and situation was proper and necessary to afford adequate relief to respondent.

The jurisdiction of courts of equity to intervene and effectuate their own decrees by injunction in order to avoid the re-litigation of questions once settled by the same parties and to prevent vexatious suits is unquestioned.

The facts and situation in this case make it one calling for the granting of equitable relief.

The argument on these propositions in the original brief appears at pages 181-187.

See, also, Pomeroy, Equitable Remedies (2d Ed.), Sec. 367.

This case was originally started by the filing of a bill August 28th, 1933, and the court's opinion, findings of fact, conclusions of law and final decree were entered on December 1st, 1936 (F. R. 12, 179, 202, 204). The Circuit Court of Appeals rendered its opinion on August 8, 1938 (F. R. 1689). After five years of struggle by the parties this court denied certiorari on December 5, 1938 (305 U. S. 650).

The language of Mr. Justice Brewer in *Riverdale Cotton Mills* v. *Alabama-Georgia Mfg. Co.*, (1905) 198 U. S. 188, 195, might almost be paraphrased in this case. That suit involved a mortgage foreclosure suit in the federal court in which a sale had been made and an attempt was later made by bondholders to institute separate proceedings in the state court. Quoting from the opinion:

> "For over ten years from January 21, 1891, the date of the filing of the original bill, litigation was carried on in the Circuit Court of the United States for the Northern District of Georgia and in Appellate Courts, in the foreclosure of a trust deed executed by the Alabama & Georgia Manufacturing Company. In the course of that litigation decrees were entered and reviewed, sales were made and set aside, possession of property was transferred and retransferred, accountings had of the proceeds of property in possession, and when it seemed that at last litigation was at an end, the foreclosure consummated and the title established in the purchaser, we are told that it all amounted to nothing; that parties, lawyers and courts have been spending their time and labor in simply batting the air. The jurisdiction of courts of equity to intervene and effectuate their own decrees by injunction or writs of assistance in order to avoid the relitigation of questions once settled by the same parties is well settled."

The facts in this case also pointedly presented the ground for equitable relief to prevent a multiplicity of suits and of harassing and vexatious litigation.

The petitioner on September 23, 1938, had petitioned the Circuit Court of Appeals for a stay of mandate on its original decision (F. R. 1716), which stay was granted on October 3, 1938 (F. R. 1717). The petitioner had filed one action at law in Delaware on September 29, 1938, while its petition for stay of mandate was pending and before its petition for certiorari had been filed and decided in this court (Ex. SC-1 R. 294-300) (305 U. S. 650). Petitioner had filed an action in equity in Delaware on February 18, 1939 (Ex. SC-2 R. 301-306), and it had filed another action at law in Delaware with summons returnable September 18, 1939 (Ex. SC-3 R. 307-319), and had filed a fourth action at law in Delaware with summons returnable September 18, 1939 (Ex. SC-4 R. 320-339), and had filed a fifth action at law in Delaware with summons returnable September 18, 1939 (Ex. SC-5 R. 340-378), and

on June 2, 1939, had recorded the mortgage held fraudulent in the original decree (Exs. SC-6 and SC-7 R. 374-384).

Respondent with leave of court on the 18th day of September, 1939, filed a supplemental and ancillary bill for temporary and permanent injunction (R. 2, 12). Petitioner having been served with notice of motion for leave to file the ancillary bill appeared thereto on September 18, 1939 (R. 2, 101). And on September 18, 1939, an order was entered fixing September 28, 1939, for hearing on motion for temporary injunction (R. 101). Amendment to ancillary bill was filed September 28, 1939 (R. 98-100). On September 28, 1939, petitioner filed resistance to hearing for temporary injunction (R. 112-117). Temporary injunction was granted October 7, 1939 (R. 120-140, filing date R. 140). Hearing on ancillary bill for permanent injunction was had March 11, 1940, and the matter fully submitted (R. 257, 293). And on March 23, 1940, the court entered its findings of fact, conclusions of law, opinion and final decree of permanent injunction (R. 700-722). It found that the matters involved in the Delaware actions and in the mortgage had been previously determined in this action, and the original decree should have ended the matter. Petitioner not having been content to leave the matter closed, having commenced the series of Delaware suits here involved and having recorded the mortgage which had been held to be invalid, without consideration and void, the federal district court as a court of equity having jurisdiction of the parties and of the subject matter was, when asked to issue an injunction to protect its own judgment and decree, entitled to consider in determining whether there was equity in the ancillary bill, whether or not a multiplicity of suits and vexatious and harassing litigation would not be thus prevented. The court did so find (Finding 13, R. 713).

This case involves the issue whether the matters involved in the Delaware suits and in the mortgage were

determined in this cause. This question arises in each of the Delaware suits. This case is within the classification adopted by Pomeroy, which he states as the case where "dispute is between two individuals, A and B, and B institutes or is about to institute a number of actions, either successively or simultaneously, against A, all depending upon the same legal questions and similar issues of fact, and A by a single equitable suit seeks to bring them all within the scope and effect of one judicial determination." Pomeroy, Equity Jurisprudence (4th Ed.), Vol. I, Sec. 245.

The opinion, findings and permanent decree of the trial court, affirmed by the Circuit Court of Appeals, have determined this whole matter in one ancillary proceeding, if affirmed by this court.

In addition to the facts of equitable consideration stated in respondent's brief pages 182-187, we want to further call the court's attention to the inequitable hardship that would be imposed upon respondent to permit the Delaware actions to be further prosecuted.

The record on the original trial of this cause is very voluminous, as will be noted from the printed record which was before the Circuit Court of Appeals on the first appeal. To present this voluminous record in the Delaware cases by certified, exemplified copies of the depositions, transcripts and exhibits would involve enormous expense, yet in view of petitioner's readiness to dispute the record it would probably be necessary to do so. It might also be necessary to prosecute an appeal in each of the cases to the Delaware Supreme Court which would require a printing of the record in each case at large expense and it might involve five petitions for writ of certiorari to this court, which under the rules of this court would require the printing and filing of forty copies of record in each case at great expense. It would involve trials in Delaware, over 1,000 miles away from where the bridge company's business and properties are located, at great expense as has been pointed out on pages 183-184 of

respondent's brief. All this we submit would be very inequitable to the respondent who has already successfully defended itself against the fraudulent claims of the petitioner in the federal court where the complainants chose to bring this action.

As stated by Pomeroy:

> "The court will interfere and restrain the defendant's further prosecution of successive actions at law, and will thus establish and quiet the plaintiff's right, when all the questions of law and fact involved in these actions have already been fully determined in the plaintiff's favor by some former judicial proceeding between the same parties."
>
> Pomeroy, Equity Jurisprudence (4th Ed.), Vol. I, Sec. 253.

A clear class of cases in which injunction is granted is composed of those in which such injunction is granted to suppress undue and vexatious litigation.

See Story on Equity Jurisprudence (14th Ed.), Sec. 1226.

See respondent's original brief pp. 182-187.

An inadequacy of legal remedy exists where one is bound to litigate a multiplicity of suits having a community of facts and issues. Avoidance of the burden of numerous suits at law between the same parties where the issues are substantially the same is a recognized ground for equitable relief in the federal courts.

Kessler v. *Eldred*, 206 U. S. 285.

Di Giovanni v. *Camden Fire Ins. Ass'n*, 296 U. S. 64.

Sovereign Camp W. O. W. v. *O'Neill et al.*, 266 U. S. 292.

Petitioner's disdain and want of respect for the courts is well illustrated in a letter of John A. Thompson of November 23, 1938, to the stockholders of the bridge company: "I am not asking you or any other man to help

me or to help Phoenix; Phoenix does not need any help in its fight to maintain its creditor position. In the end the facts will all be proved in competent courts. I am not a bit disturbed about the outcome, etc." And in a letter to a stockholder and director of the bridge company of June 12, 1939: "It makes little difference whether the bridge company pays the debt by reason of a mortgage foreclosure or by way of a judgment and execution against the bridge" (Court's finding 11, R. 711-12).

FURTHER ANSWER TO PETITIONER'S POINT FOUR.

The granting of the injunction involved in this case did not violate Section 265 of the Judicial Code (Act of March 2, 1793, C. 22, Sec. 5, 1 Stat. L. 334, R. S., Sec. 720, 28 U. S. C. 379), but was in accord with the spirit of that section and the consistent construction of it by this court.

In addition to the argument in respondent's original brief on this point pages 188-197 respondent respectfully submits the following:

If this case had been tried originally in the state court of Iowa and subsequently an ancillary bill filed to prevent the re-litigation in a foreign jurisdiction of the matter determined and to enforce the decree and to preserve the fruits thereof the Iowa court would have rendered the injunction decree which the federal court rendered in the instant case in accordance with the holding of the Iowa Supreme Court in the case of *Oates* v. *Morningside College*, (1934) 217 Iowa 1059, 252 N. W. 783. Such is the law of Iowa. We submit that the Oates case is an exact parallel of this case.

Section 34 of the Federal Judiciary Act of September 24, 1789, c. 20, 28 U. S. C., Sec. 725, 28 U. S. C. A., Sec. 725, provides:

> "The laws of the several States except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

In *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, this court held that the phrase "laws of the several States" as used in the statute just quoted includes not only statutory law but also the state decisions and that a case tried in the federal court is to be determined in accordance with the laws of the state where the case is tried.

The statute contains "shall be regarded as rules of decision in trials at common law in the courts of the United States." How could a federal court carry that out if it were shorn of its power to make effectual its decree and orders to preserve the fruits thereof? Would it not be rendered impotent to do the very thing that this statute contemplates that the federal court shall do?

The decision in the Erie R. R. case contemplates that the same rules of law shall apply and the same relief be granted whether the case be tried in the state court or in the federal court. If Section 265 were to be now construed as prohibiting a federal court to enforce its decrees and to preserve the fruits thereof by injunction the objects intended to be accomplished by the decision in the Erie case would be frustrated. Immediately a situation would be presented where parties fraudulently inclined could commence their actions in the federal court, try them to final determination, and if defeated treat the whole thing as nugatory and proceed anew elsewhere, and if successful the defendant would be bound.

Such a construction would also render meaningless the words of this Court in *Root* v. *Woolworth*, 150 U. S. 401:

> "Where the court possesses jurisdiction to make a decree it possesses the power to enforce its execution."

And would involve an overruling of this Court's decision in the case of *Local Loan Company* v. *Hunt*, 292 U. S. 234, which we submit is an exact parallel of the instant case.

We contend that Judicial Code, Section 265, must be construed in the light of the above quoted statute and in the light of Judicial Code, Section 262 (U. S. C. A. Sec. 377), and when so construed it is apparent that it was never intended to prevent the federal court from enforcing its decrees and preserving the fruits thereof and preventing the re-litigation of the same matters between the same parties once determined by the federal court.

We contend that the prohibition of Section 265 was intended to apply to cases first commenced in the state court and not to cases already fully tried and determined by a federal court sitting as a court of equity.

In *Julian* v. *Central Trust Company*, 193 U. S. 93, where after suit in the federal court for foreclosure of mortgage resulting in decree, sale, confirmation and delivery of possession to the purchaser, it was attempted to subject the property to judgments rendered in the state court against mortgagor on causes of action arising subsequent to confirmation of foreclosure sale, it was held that the federal court properly on supplemental bill restrained enforcement of the state court judgments in order to protect the title it had conveyed by foreclosure proceedings. The court said:

> "In such cases where the federal court acts in aid of its own jurisdiction and to render its decree effectual, it may, notwithstanding Section 720, Revised Statutes (Section 265, Judicial Code), restrain all proceedings in a state court which would have the effect of defeating or impairing its jurisdiction."

If Section 265 were to be construed as preventing federal courts from enforcing their decrees by enjoining parties from re-litigating in other courts matters determined in a cause of which the federal court first obtained

jurisdiction of the parties and subject matter, the powers of the federal courts and the effectiveness of their decrees in railway bonds and other foreclosure cases would be greatly impaired. Federal foreclosure sales would not be attended. There simply would not be any purchasers as no one would want to buy anything under a foreclosure decree, the determination of which might at any time be litigated in various courts elsewhere.

Also see *Riverdale Cotton Mills* v. *Alabama Mfg. Co.*, 198 U. S. 188, argued before this Court by Mr. Louis D. (later Mr. Justice) Brandeis.

One of the leading cases is that of *Gunter* v. *Atlantic Coast Line Railroad Company*, 200 U. S. 273, 50 L. Ed. 477, opinion by Mr. Justice White. It appears that the Legislature of South Carolina had exempted the capital stock and property of the Northeastern Railroad Company from all taxation during its charter existence. Some time later a law was passed providing for assessment and taxation of all property in the state. The Cheraw & Darlington Railroad Company, the successor to the Northeastern Railroad Company, was assessed for taxation under this law; thereupon a stockholder of the railroad company filed his bill in the Federal District Court against the railroad company and the county treasurers of the proper counties, praying that the treasurers be enjoined from collecting and the railroad company from paying the taxes. An injunction was granted. This was the original case and is known as the Pegues Case. For twenty-five years no attempt was made to tax the property of the railroad company. Then a new suit was brought against the railroad company alleging that it had been mistakenly treated as having a right to exemption and asking to recover the sum of taxes, penalties and interest for a period of ten years. Thereupon the Atlantic Coast Line Railroad Company, the successor to the Cheraw & Darlington Railroad Company, filed a bill entitled and numbered as of the original cause which had been determined twenty-five

years before, praying that it be protected in the rights and privileges adjudged in that case and be accorded the benefit of the injunction issued, and that the attorney general of the state be enjoined from further prosecuting the actions commenced in the state court.

After having first found that the parties were privies to the decree in the first case, the court went into the question as to whether the decree rendered in the first cause established the exemption embraced in the issues of the case at bar. It was claimed by the attorney general that the original decree in the Pegues case was based upon the assumption that there was consideration for the exemption, and that this was an erroneous assumption by the court and that if the truth had been established, a different decree would have been rendered. The Supreme Court says that all defenses existing at the time of the decree in the Pegues case, whether brought to the attention of the court or waived, were foreclosed by the decree. The court then goes on to discuss whether the lower court erred in granting the relief, and after referring to the statute which is now Section 265 of the Judicial Code, says:

> "The soundness of the doctrine relied upon is undoubted. The difficulty is that the doctrine is inapplicable to this case * * * the right of the court to administer relief—to make its decree effective—cannot be measured by constitutional or statutory provisions relating to original proceedings where jurisdiction over the controversy did not obtain * * * Indeed the provision that the Eleventh Amendment or Section 720 of the Revised Statutes (United States Compiled Statutes, 1901, page 581), control a court of the United States in administering relief, although the court was acting in a matter ancillary to a decree rendered in a cause over which it had jurisdiction, is not open for discussion * * * *And this reasoning disposes of the contention that the court below erred in enforcing its prior decree because there was adequate remedy at law by interposing a defense in the state courts to the actions brought by the at-*

torney general. That question was foreclosed by the decree in the Pegues Case * * * Having acquired by that decree a right which the petitioner was entitled to enforce * * * that rule could not rightly be invoked to deprive the court below as a court of equity of the power to protect the petitioner in the enjoyment of rights previously secured under a decree of the court" (emphasis supplied).

Slaughter v. *Slaughter*, 48 F. 2d 210, Circuit Court of Appeals, Fifth Circuit, opinion by Judge Bryan, petition for writ of certiorari denied 284 U. S. 643, 76 L. Ed. 547. In this case it appears that W. B. Slaughter had been adjudged a bankrupt in 1918. His trustee in bankruptcy filed the original suit against C. C. Slaughter Company and G. G. Wright, to whom, before bankruptcy, he had conveyed all of his property. The trustee's suit sought to recover the property for the benefit of the bankrupt estate. A compromise settlement was made under which the defendants kept the property sued for, but paid $85,000 to the trustee. That settlement was approved and confirmed by the bankruptcy court in a final judgment. Later W. B. Slaughter brought suit against C. C. Slaughter Company and Wright in the District Court of Palo Pinto County for damages and to recover the property that had been awarded to the defendants by the compromise settlement in the bankruptcy court. Slaughter obtained judgment in the state court for the recovery of the property and for $30,000 damages. *This judgment was appealed and reversed, and to prevent a retrial of the suit in the state court, the appellees, C. C. Slaughter* Company and G. G. Wright, filed a supplemental bill in the bankruptcy court to enforce the compromise of March, 1919, praying for an injunction against Slaughter restraining him from prosecuting the suit. Thereafter the bankruptcy court granted a permanent injunction restraining the defendant in the supplementary bill from further prosecuting the suit in the state court. The defendant in the supplemental bill then filed suit in the

federal court, praying, among other things, that the injunction entered in the bankruptcy proceedings be vacated. The lower court refused to vacate the judgment of the bankruptcy court and the Circuit Court of Appeals affirmed the holding of the lower court, saying:

> *"The court fully had the power to protect its own previous decree and in doing so to grant the injunction prayed for in the supplemental bill"* (Emphasis supplied).

In *Wilson* v. *Alexander*, (5th C. C. A.) 276 Fed. 875 the court said:

> *"There can be no doubt of the jurisdiction of the United States Court to entertain proceedings to construe and give full effect to its decree* * * * The right to plead the decree of the federal court in defense to Alexander's suit in the state court is no reason why a resort should not be had to the equitable jurisdiction of the federal court."

Also to the effect that the fact that a plea of *res judicata* has been or may be interposed in a state court is no defense to the granting of injunctive relief by the federal court, see:

> *Local Loan Company* v. *Hunt*, 295 U. S. 234.
> *Oates* v. *Morningside College*, 217 Iowa 1059, 252 N. W. 783, 786.
> *O'Haire* v. *Burns*, 25 Colo. 453, 100 Pac. 755, 757.
> *Kessler* v. *Eldred*, 206 U. S. 285.

In *Hale* v. *Bimco Trading, Inc.*, 306 U. S. 375, this Court said:

> "Appellants are in effect contending that no proceedings are here available to bring the constitutionality of the Florida statute before this Court, once the state court directed its enforcement. The Supreme Court of Florida itself manifested no such strangling conception of Section 265. It did not deem the proceedings initiated below as a denial of the right of way of a state court through an obstructive

exercise of authority by a United States court. On the contrary, in staying 'all further proceedings and actions' until this Court had finally passed upon its constitutionality, the Supreme Court of Florida recognized the propriety of the present proceedings as an orderly mode for invoking the ultimate judicial voice on constitutional issues. Therefore, Section 265 has no relevance here. That provision is an historical mechanism (Act of March 2, 1793, 1 Stat. 334, 335) for achieving harmony in one phase of our complicated federalism by avoiding needless friction between two systems of courts having potential jurisdiction over the same subject-matter. *Wells Fargo & Co.* v. *Taylor*, 254 U. S. 175, 183, 41 S. Ct. 93, 96, 65 L. Ed. 205. The present record presents no occasion for bringing this safeguard into play."

In *Wells Fargo & Co.* v. *Taylor*, 254 U. S. 175, this Court in considering the applicability of Section 265 in that case stated:

"The provision has been in force more than a century and often has been considered by this court. As the decisions show, it is intended to give effect to a familiar rule of comity and like that rule is limited in its field of operation. Within that field it tends to prevent unseemly interference with the orderly disposal of litigation in the state courts and is salutary; but to carry it beyond that field would materially hamper the federal courts in the discharge of duties otherwise plainly cast upon them by the Constitution and the laws of Congress, which of course is not contemplated. As with many other statutory provisions, this one is designed to be in accord with, and not antagonistic to, our dual system of courts. In recognition of this it has come to be settled by repeated decisions and in actual practice that, where the elements of federal and equity jurisdiction are present, the provision does not prevent the federal courts from enjoining the institution in the state courts of proceedings to enforce local statutes which are repugnant to the Constitution of the United States (citing authorities) or prevent them from maintaining and protecting their own jurisdiction, properly acquired and still subsisting, by enjoining attempts to frustrate,

defeat or impair it through proceedings in the state courts (citing authorities), etc."

Also see *Essanay Film Mfg. Co.* v. *Kane*, 258 U. S. 358.

Petitioner cites *Oklahoma Packing Company et al.* v. *Oklahoma Gas & Electric Co. et al.*, 309 U. S. 4. That was a case where a state court first obtained jurisdiction and the facts in that case bear no similarity to the facts in the instant case.

Petitioner cites *Equitable Life Assur. Soc.* v. *Wert*, 102 F. 2d 10. The facts in this case are readily distinguishable from the instant case. The decision in that case was written by Circuit Judge Sanborn, who also heard the present case and concurred in the opinion rendered in this case.

Petitioner cites *Guardian Trust Company* v. *Kansas City Southern Ry. Co.*, (8 C. C. A.) 171 Fed. 43. When that part of the opinion is read preceding petitioner's quotation it will be noted that it has no application to the instant case. In the opinion the court said: "The suit in equity is not upon the same cause of action as any of the actions at law."

In *St. Louis-San Francisco Railway Co.* v. *M'Elvain*, (8 C. C. A.) 253 Fed. 123, the court in an opinion rendered by Sanborn, Circuit Judge, states:

> "A suit in equity, dependent upon an original suit or action of which the federal court had jurisdiction, may be maintained in that court (1) to aid, enjoin, or regulate the original suit; (2) to restrain, avoid, explain, or enforce the judgment or decree therein; (3) to enforce or adjudicate liens upon or claims to property in the custody of the court in the original suit; and (4) to enforce its decree or judgment in the original suit, to prevent the relitigation in other courts of the issues it has heard and adjudged in the original suit, and to protect the titles and rights acquired by purchasers under its decree, or judgment

> from attacks by suit or otherwise, based on the theory that its adjudications in the original suit were illegal and ineffective, and to accomplish these ends the court has the jurisdiction and authority to use its writs of injunction and its writs of assistance."

In *Steelman* v. *All-Continent Corporation*, 301 U. S. 278, in an opinion delivered by Mr. Justice Cardozo this Court said:

> "We are unable to yield assent to the statement of the court below that 'The restraint of a party is legally tantamount to the restraint of the court itself.' The reality of the distinction has been illustrated in a host of cases (Citing numerous authorities)."

As stated by Mr. Justice Reed in *U. S.* v. *American Trucking Ass'n, Inc.*, 310 U. S. 534, 542, in speaking of literal interpretations:

> "When that meaning has led to absurd or fatal results, however, this Court has looked beyond the words to the purpose of the Act. Frequently, however, even when the plain meaning did not propose absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole,' this Court has followed that purpose, rather than the literal words."

It may well be said that Congress has concurred in the construction placed on Section 265 by this Court in cases involving anciliary proceedings to effectuate the decrees of federal courts.

Not only has there been no indication of any public sentiment for a change in such construction, but Congress has at all times had full knowledge of the construction of Section 265 by this Court and the other federal courts and no legislation has been enacted which would indicate that Congress did not fully concur with the judicial interpretation of that section.

To meet the criticisms of the practice of federal courts of suspending or sustaining enforcement of state statutes

on the ground of unconstitutionality, by which one judge on *ex parte* hearing and affidavits suspended the acts of legislatures and commissions, the Congress (Act of June 18, 1910, Ch. 309, Sec. 17, 36 Stat. 557, and later amendments) amended Section 266 of the Judicial Code (28 U. S. C., Sec. 380), to require concurrence of at least three judges, at least one of whom must be a justice of the Supreme Court or a Circuit Court judge before a temporary injunction can be granted, and requiring that the application must be heard by a three judge court.

Congress also by the Act of May 14, 1933, Ch. 283, Sec. 1, 48 Stat. 775, amended Section 24, Judicial Code (U. S. C., Sec. 41), by depriving the district courts of jurisdiction of any suit to enjoin, suspend or restrain the enforcement, operation or execution of any order of an administrative board or commission of a state or any rate making body of any political subdivision thereof, or to enjoin, suspend or restrain any action in compliance with any such order where such order has been made after reasonable notice of hearing, and where a plain, speedy and adequate remedy may be had at law or in equity by the courts of such state.

By the Act of August 21, 1937, Ch. 276, Sec. 1, 50 Stat. 738, amending the same section, the Congress deprived the district courts of jurisdiction of any suit to enjoin, suspend or restrain the assessment, levy or collection of any tax imposed by or pursuant to the laws of any state where a plain, speedy and adequate remedy may be had at law or in equity in the courts of such state.

It will be noted that even by these amendments the right of the federal courts to interfere where there is no plain, speedy and adequate remedy at law or in equity in courts of the state is recognized.

Moreover, in each case a saving clause was adopted (Sec. 2, Act of May 14, 1934, and Sec. 2, Act of August 21, 1937; U. S. C., Sec. 41, Subd. 1a), permitting the continuance of any suit commenced in the district courts prior to the adoption of each amendment.

A reading of these amendments makes it clear that the Congress has recognized the right of the federal courts to enjoin parties from proceeding in the state courts and their construction of the provisions of Section 265, Judicial Code.

Section 266, Judicial Code, as amended, recognizes the power of a three judge court to restrain the execution of a statute or order, except in cases where a suit has been brought in a state court *and there has been a stay of proceedings under the statute involved pending decision by the state court and the suit in the state court is prosecuted with diligence and good faith.*

Section 24, Judicial Code, as amended, recognizes the right of federal courts to restrain an action in compliance with an order of an administrative board or commission of a state or a rate making body of any political subdivision thereof for the collection of a tax where there is no efficient remedy at law or in equity in the courts of the state.

This recognition by the Congress of the inherent powers of the federal courts (and it is a recognition and concurrence in the decisions of the court sustaining such powers because no specific authority to enjoin is given as in the Interpleader Act), is further demonstrated by the saving clauses last hereinbefore referred to, permitting the continuance to completion of suits brought prior to the amendments in the cases thereafter to be excepted.

The Congress has at no time expressed any disapproval of the practice of the federal courts of equity of protecting their own jurisdiction and decrees, and the fact that other restrictive amendments have been adopted indicates the concurrence of the Congress in the decisions of this Court recognizing the exceptions to Section 265.

CONCLUSION.

We respectfully submit that the decision of the Eighth Circuit Court of Appeals should and ought to be affirmed.

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WM. C. GREEN,
Counsel for Respondent.

Erratum: All references in this Appendix are to first record.

APPENDIX.

John A. Thompson, His Associates And Corporate Connections.

Court's Finding 19.

John A. Thompson was interested in, and with his wife, M. K. Thompson, and his associates A. B. Wilder and Emory H. English, controlled the Phoenix Finance System, Inc., the Phoenix Finance Corporation, and Thompson and Company, which was the wholly owned subsidiary of the Phoenix Finance System, Inc. M. White was John A. Thompson's Secretary and an officer of the Phoenix Finance System, Inc. and of Thompson and Co. (R. 674, 545, 684, 589; Master's Finding 4, R. 129; Court's Finding 19, R. 188).

John A. Thompson's Control Of The Bridge Company.

Court's Finding 20.

In October and November, 1930, through negotiations with John W. Shaffer and Vernon W. O'Connor, John A. Thompson became president of and acquired control of the Bridge Company. At about the same time the number of directors of the Bridge Company was increased and Thompson, together with other directors in the Phoenix Finance System, Inc., became directors of the Bridge Company. From that time on Thompson controlled the Bridge Company. At a directors' meeting November 1st, 1930, O'Connor resigned as president, Thompson was elected president and O'Connor became chairman of the Board (R. 538, 861-862; Master's Report, R. 123; Master's Finding 4, R. 129; Court's Finding 20, R. 188)

On November 11th, 1930, an annual meeting of stockholders was held at which J. A. Thompson, President, presided and his wife, M. K. Thompson, acted as Secre-

tary. 1509 shares of stock were represented in person, 1500 of which shares were those held by the Standard Shares Holding Company, represented by John W. Shaffer, President, and 9 shares by two other stockholders. Proxies were represented by V. W. O'Connor for 664 shares, the total number of shares represented being 2173. The meeting was controlled by John A. Thompson and his associates, John W. Shaffer and Vernon W. O'Connor (R. 865-871).

The stock ledger shows that on November 26th, 1930, 1400 shares of Class A stock and 1800 shares of Class B stock were issued to John W. Shaffer and Company, and on the same day the same number of shares of stock were transferred by Shaffer and Company to Thompson and Company, and Thompson and Company on that date also held an additional four shares of Class B stock. (R. 596, 1335). John A. Thompson in November, 1930, had personally 40 shares of Class A stock and 25 shares of Class B stock. (R. 1305)

A. B. Wilder, another director of the Phoenix Finance System, Inc., held 5 shares of Class A and 5 shares of Class B Bridge Company stock in November, 1930 (R. 1311). The Class B voting stock of the Bridge Company then acquired and held by Thompson and Company, John A. Thompson, and A. B. Wilder, was 1834 shares, more than one-half of the total 3750 shares of Class B voting stock authorized or outstanding.

On March 10th, 1931, an annual meeting of stockholders was held, at which were represented Thompson and Company by John A. Thompson 1310 shares, and the total number of shares represented personally and by proxy being 2588 shares, said John A. Thompson represented more than a majority of the stock represented in person and by proxy and controlled the meeting (R. 886-890).

At the stockholders' meeting of December 22nd, 1931, when the bonds were purportedly voted, the total stock

voted by John A. Thompson by proxy and in person was 642 shares and by Mr. Thorson by proxy 1011 shares and in person eighteen shares, by Mrs. John A. Thompson twenty shares, and by M. White, John A. Thompson's Secretary, eighteen shares. The total vote for the resolution at the meeting as shown by the record was 2273 shares, with 365 shares voting against it. Of the votes cast for the resolution, Thompson, Thorson, Mrs. John A. Thompson (M. K. Thompson) and M. White voted 1709 shares, as shown by the record more than one-half of the stock represented in person and by proxy (R. 591, 955-958) Thorson was a Thompson director in the Bridge Company. Eighteen shares of Class B stock of the Bridge Company had been transferred to him from Thompson and Company by John A. Thompson. He paid nothing for them, and later transferred them to the Phoenix Finance Corporation. On the same day there was one share of stock transferred to him by John A. Thompson for which he paid nothing (R. 595, 609). He was employed by Thompson in the work of the Bridge Company, (R. 641), and elected a director at Thompson's suggestion (R. 642). He always acted with Thompson and never took issue with him (R. 642, 667). The proxies voted by Thorson at the December 22nd, 1931, meeting read to Oscar R. Thorson, John H. Thompson, Emory H. English (R. 947-949). Emory H. English was another director of the Phoenix Finance System, Inc., and also a director of the Bridge Company (R. 546). One share of Class B Bridge Company stock was transferred to Emory H. English from Thompson and Company. There was no further Bridge Company stock issued or transferred to him (R. 594). He never took issue with John A. Thompson (R. 668). The proxies running to the three persons named were voted by Oscar R. Thorson (R. 955-958, 591).

John A. Thompson, at the stockholders' meeting of December 22nd, 1931, when the bonds were voted, dominated and controlled the meeting. He stated:

"It don't make any difference how many of you stockholders vote here. I've got the votes to carry it." (R. 664)

He stated that he had enough votes to control the meeting on the bond issue, that the bond issue would go through, and that the stockholders present would be allowed to vote by courtesy only. There were stockholders who attempted to talk and he told them to "sit down", and gave them no opportunity to express themselves. He called some of the stockholders "peanut stockholders" (R. 672, 673, bottom p. 686, top p. 687). That he fully appreciated the power of his dominant control in the Bridge Company, is shown by the fact that Exhibit 19 G.A.B., the consolidated balance sheet of Phoenix Finance System, Inc., and subsidiary corporations, as of December 31st, 1931 (R. 1419), in which the Iowa-Wisconsin Bridge Company is listed as a subsidiary of Phoenix Finance System, Inc. (R. 675, 1419) was prepared under his instructions.

At the annual stockholders' meeting held on March 8th, 1932, out of 2917 votes cast at the election John A. Thompson, Oscar R. Thorson, and H. T. Wagner held 1301 proxies, with others they held 21, and Wagner held 195. John A. Thompson cast 264 votes in person. Thus Thompson and his associates cast 1781 votes out of a total of 2917 and controlled the election of the board, at which a majority of Thompson controlled directors, to-wit: John A. Thompson, H. T. Wagner, Oscar R. Thorson, Emory H. English, M. K. Thompson, and A. B. Wilder, were elected (R. 986-999). At the directors' meeting immediately following, the officers elected were John A. Thompson, President; Emory H. English, Vice President; Oscar R. Thorson, Secretary and Treasurer; M. K. Thompson, Assistant Secretary and Treasurer (R. 1001, 1002).

A Board of Directors of the Bridge Company was selected by John A. Thompson at a stockholders' meeting held on July 8, 1933. There were present in person 964

shares. Oscar R. Thorson held proxies for 435 shares and John A. Thompson proxies for 848 shares which were recognized. That proxies of 125 other shares were held by Oscar R. Thorson which were not voted. There were 1415 other proxies which through Thompson's control of the meeting were not recognized nor permitted to vote on the alleged ground that a by-law provided that proxies should be filed with the secretary more than five days prior to the meeting, although the by-law provided that notwithstanding such provision, the stockholders present or represented at the meeting could by vote waive the provisions and have all stock voted whether their proxies were filed before the meeting or not.

A motion was made at the meeting by an independent stockholder, that all proxies held at the meeting be voted. The independent stockholders, present cast 555 votes for the motion but it was voted down by the votes of the Phoenix Finance System, Inc., and by the proxies held by Mr. Thorson. There were 1388 shares cast against it and of these, 1155 were the proxies held by Oscar R. Thorson and by John A. Thompson of the Phoenix Finance Corporation. On the final vote for directors, there were 1878 votes cast and 1440 of these votes were cast for a Thompson controlled Board of Directors. Of these 1440 votes Phoenix Finance Corporation and Oscar R. Thorson controlled at least 1155. There were 412 votes of those present cast for independent nominees for directors and if the 1415 proxies held by independent stockholders had been recognized, there then would have been sufficient votes to elect an independent Board of Directors (R. 1033).

Of the directors of the Iowa-Wisconsin Bridge Company who served as such from the time Thompson became president of the Bridge Company until after the last of the bonds in question were issued, the majority were Thompson controlled and dummy directors.

The relationships of Emory H. English and Oscar R. Thorson to Thompson have already been set forth.

M. White was John A. Thompson's secretary. She owned no stock of the Bridge Company except qualifying shares transferred to her by John A. Thompson from Thompson and Company's holdings, for which she paid nothing (R. 593-594). She was assistant secretary and treasurer and a director of the Phoenix Finance System, Inc., and a director and officer of Thompson and Company. She never took issue with John A. Thompson (R. 588, 589, 668).

A. B. Wilder owned $100,000.00 of stock in Phoenix Finance System, Inc. (R. 626), was a director of that corporation, and also of the Phoenix Finance Corporation (R. 546, 550) and a director of the Bridge Company (R. 626). He never took issue with John A. Thompson (R. 668).

M. K. Thompson was the wife of John A. Thompson (R. 638).

N. W. Elsberg never held any stock in the Bridge Company and took no active part in the affairs of the Bridge Company (R. 594, 643).

A. N. Nystrom never held any stock in the Bridge Company (R. 594). He was a stock salesman for Thompson and Company (R. 590).

C. H. Young never held any stock of the Bridge Company (R. 594). He attended only a few meetings and never examined the books of the company nor went into any of the details connected with the Company (R. 643).

J. W. Dempsey was one of the original promoters of the bridge project (R. 665). He never took any issue with Thompson at any meetings except on election of director as hereinafter stated, and particularly did not take issue with him on the bond issue at the December 22nd, 1931, meeting (R. 668).

H. T. Wagner was a stockholder, but a part of his stock subscription in the amount of $2,000.00 was cancelled about the time the bond issue was voted (R. 595-596; Journal R. 1515). Such cancellation of subscription was charged under a heading "Expense-Cost of Bridge"

(R. 1551). The minutes show no authority by the directors for such cancellation. The minute records show that he never voted against Thompson on any issue (R. 865-1010). He did not take any issue with Thompson at directors' meetings, nor on the bond issue (R. 668).

Vernon W. O'Connor, by his own statement, had absolute confidence in Thompson and followed his directions (R. 640-641).

J. H. Thompson held only three shares of stock in the Bridge Company (R. 595). He operated the Peoples Bank at Lansing, with which the Bridge Company carried an account (R. 667). He was a joint proxy holder with Emory H. English and Oscar R. Thorson at the stockholders' meeting on December 22nd, 1931, at which the bond issue was voted, and permitted Oscar R. Thorson to vote the proxies for the bonds (R. 947-950, 965).

Thompson's control of the Board as it existed when the bond issue was voted, is also illustrated by the minutes of the Board of Director's meeting held on December 22nd, 1931, immediately following the voting on the bond issue. C. H. Young, having resigned, H. A. Schremser, an independent stockholder and one of the witnesses for interveners in this action, and Mrs. M. K. Thompson, the wife of John A. Thompson, were nominated to fill the vacancy. On the vote, Messrs. Bakewell, Foote, Dempsey and John H. Thompson voted for Mr. Schremser and Messrs. English, Thorson, Wagner, Wilder, J. A. Thompson, and Miss White voted in favor of the election of Mrs. Thompson (R. 965, 966).

When John A. Thompson became president of the Bridge Company in 1930 he acquired actual knowledge of all the dealing, contracts, assignments, and transactions that had previously occurred as above set forth and the relationship of the parties thereto to the Bridge Company (R. 679, 680, 581, 638; Court's Finding 20, R. 188).